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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1610

CHARLES DAVIS, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, CHARLES DAVIS, JR. AND JERRY DAVIS,
Petitioners,

versus

ROYAL-GLOBE INSURANCE COMPANIES (GLOBE INDEMNITY COMPANY) AND LOUIS C. PHILIPS,
Respondents.

Petition for a Writ of Certiorari To The Supreme Court of Louisiana

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IN THE
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No.

CHARLES DAVIS, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, CHARLES DAVIS, JR. AND JERRY DAVIS,

Petitioners,

versus

ROYAL-GLOBE INSURANCE COMPANIES (GLOBE INDEMNITY COMPANY) AND LOUIS C. PHILIPS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The petition of Mrs. Charles Davis, prays that a writ of certiorari issued to review the opinion and judgment of the Supreme Court of the State of Louisiana, which reversed a jury verdict on question of fact in favor of her minor children without affording petitioner minimal due process and making the judgment res adjudicata.

OPINIONS BELOW

This case involves a suit for damages by the parents on behalf of their illegitimate, but acknowledged child-

ren for brain damage that they have sustained as a result of injesting plaster based paint, which fell from the ceiling of the premises of Louis C. Philips, Jr. The trial resulted in a favorable jury verdict in favor of the children, the sum of ONE HUNDRED SEVENTEEN THOUSAND FIVE HUNDRED AND NO/100 ($117,500.00) DOLLARS, was rendered on January 24, 1968, and appears in Appendix A.

The jury verdict was affirmed by the Fourth Circuit Court of Appeals on June 2, 1969, and it is reported in 223 So.2d. 912, and appears as Appendix B.

The Supreme Court of Louisiana on Monday, June 20, 1970, reversed the judgment of the Court of Appeals and that of the jury and substituted its judgment on the question of fact. The hearing was timely applied for and denied on January 22, 1971. The Supreme Court opinion is reported in 242 So.2d. 839 and appears as Appendix C.

The rehearing was denied on January 22, 1971.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL QUESTIONS PRESENTED

1. That the Louisiana Supreme Court's authority to review jury verdicts and lower court opinions on questions of fact and without remanding the case for cor-

rections of errors, if any that be, constitutes a deprivation of minimum civil due process under the Seventh and Fourteenth Amendments of the United States Constitution.

2. That the Supreme Court of Louisiana in substituting its judgment on questions of fact to that of a civil injury is to deny petitioners a basic right preserved by the Seventh Amendment of the United States Constitution.

3. That Article 7, Section 10 of the Louisiana Constitution which allows the Supreme Court of Louisiana to review the findings of a civil jury on questions of fact is unconstitutional and in contravention of the Seventh Amendment of the United States Constitution which preserves the right to a trial jury in all cases at common law in excess of $20.00.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VII:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Constitution of the United States, Amendment XIV:

> "... nor shall any state deprive any person of

life, liberty, or property without due process of law . . . ."

Article 7, Section 10, Civil and Probate Appeals:

Art. 7, Sec. 10, La. Constitution of 1921.

> "In civil cases, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only."

STATEMENT OF THE CASE

The facts in this case are uncontroverted and, therefore, may be introduced to the court in a summary fashion. Petitioner, Charles Davis, on behalf of his two minor children, Charles Davis, Jr., age 3, and Jerry Davis, age 2, filed a damage suit in New Orleans, Louisiana, seeking damages for injuries sustained by his two minor children from the injestion of lead based plaster flakes, which had fallen from the ceiling on the premises owned by defendant, Louis C. Philips. As the result of his injuries, young Charles sustained irreparable brain damage, shall never speak, shall excrete on himself the rest of his life, shall never work, marry or attend school, and eventually will have to be institutionalized. Mrs. Charles C. Davis was later substituted as proper party plaintiff. There was a trial by jury and a verdict rendered on behalf of Charles and Jerry Davis in the total sum of ONE HUNDRED SEVENTEEN THOUSAND FIVE HUNDRED AND NO/100 ($117,500.00) DOLLARS, which verdict is set forth in Appendix A of this petition.

The defendant's aggrieved by the decision, appealed to the Fourth Circuit Court of Appeals and the jury verdict was affirmed on June 2, 1969, and reported in 223 So. 2d. 912.

The defendants sought review by certiorari to the Supreme Court of Louisiana, and the judgments below were reversed on question of fact.

A timely application for rehearing was filed on behalf of the Davis children and denied by the Supreme Court of Louisiana on January 22, 1971. Hence this petition to review the judgment of the Supreme Court of Louisiana in as much as it has deprived the Davis children of their property without due process of law and it has failed to afford them minimal due process as guaranteed by the Seventh and Fourteenth Amendments. It further has failed to preserve a jury trial in favor of the Davis children as guaranteed by the Seventh Amendment of the United States Constitution.

It is plaintiff's initial position that Article 7, Section 10, of the Louisiana Constitution and its application by the Louisiana Supreme Court to this case denied the Davis children minimal due process guaranteed by the 14th Amendment of the United States Constitution. Minimal due process, it would appear, requires three pre-requisites to meet the requirements of civil due process: (1) Fair and reasonable notice; (2) A fair and reasonable hearing; and (3) a determination or finding based upon the prior hearing. These minimal due process requirements were afforded both plaintiffs and defendants when the case of Davis v.

Philips was tried by jury in Civil District Court for the Parish of Orleans resulting in a favorable verdict on behalf of Charles Davis in the sum of $115,000.00 and an award to Jerry Davis in the amount of $2,500.00.

The defendant exercised its guaranteed right to an appeal to the Fourth Circuit Court of Appeal resulting in an affirmation of the jury verdict in the case entitled "Davis v. Royal Globe Insurance Company, 223 So.2d 912." The appellate court in affirming the jury verdict held as follows on Page 18:

> "We find that the above evidence was sufficient for the jury to determine that the Davis children had contracted lead poisoning from ingesting paint flakes over a period of almost five months which originated from the inside of the defendant's premises. Certainly, given this evidence we are not in a position to reverse the decision of the jury on a factual basis."

Thereafter, the defendant exercised its privilege to apply for writs of certiorari to the Supreme Court of the State of Louisiana, which were granted. The Supreme Court, on June 26, 1970, reversed the civil jury verdict and that of the Fourth Circuit Court of Appeal and held as follows:

> "Since the record is now before us we find the determination of facts supporting the judgment to be manifestly erroneous and we reverse."

Further elaborating on this factual determination on page 9, it held as follows:

> "Based upon the evidence of the record we cannot agree that plaintiffs have succeeded in discharging the burden of proof by a preponderance of the evidence to a legal certainty that the defendant, Philips, breached the standard of care owed by a landlord to a child of his tenant. Thus, we are unable to find that he was negligent in maintaining the premises. Moreover, we are not satisfied that enough paint flakes fell to create a dangerous condition in the apartment. Nor do we find that lead paint from the Philips' apartment was eaten by the children for a sufficient length of time or in sufficient quantities to cause the lead poisoning they suffered."

It therefore logically follows that if the State of Louisiana affords its citizens a right to a trial by jury and this right is preserved by the United States Constitution under Article 7 thereof, and, as in this instance, if an appellate court pursuant to state law may by "state action" reverse a civil jury verdict solely on questions of fact, then the citizens of Louisiana, or any other citizens exercising his rights to a civil jury in the Courts of Louisiana, is denied civil due process under the very fact that the appellate courts may reverse a jury finding on a question of fact under State Law, particularly under Article 7, Section 10 and Section 29 of the Louisiana Constitution. Therefore, the plaintiffs have raised a most basic and fundamental

question of constitutional law, that is, whether in Louisiana its system of appellate review of facts grants its citizens even basic civil due process, or as stated in another manner, does it deny its citizenry basic civil due process in contravention to Article 7 and Article 14 of the United States Constitution, particularly when the decision of the Louisiana Supreme Court is res adjudicata and final.

This is the first case known in the Louisiana Jurisprudence wherein the Supreme Court of Louisiana has reversed a jury verdict after it has been affirmed by the Fourth Circuit Court of Appeals. This was done under the authority of Article 7, Section 10 of the Louisiana Constitution, which allows the Supreme Court of the State of Louisiana to review the findings of a civil jury on the questions of fact and law.

Petitioners would not have been aggrieved by the Supreme Court decision or deprived of civil due process if the court had found error and remanded the case for a retrial therein, and actually affording them a hearing. The Louisiana law in allowing an appellate court to substitute its judgment on a question of fact in essence deprives one of a fair and reasonable hearing, because an appellate court can disregard this jury finding and substitute its judgment for that of the jury and without remanding the case for a new trial in effect makes the judgment final in res adjudicata.

It would appear that the Louisiana system for appellate review of facts does not preserve the right to trial

by jury as provided by Article 7 of the Bill of Rights of the United States Constitution.

Article 7 of the Bill of Rights contained in the United States Constitution reads as follows:

> "In suits of common law where the value in controversy shall exceed $20.00 the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any court of the United States and according to the rules of common law."

We are all familiar with the original constitutional concept that the Bill of Rights was only applicable to the Federal Government and not to the States. We are likewise familiar that subsequent to the War Between the States, Article 14 of the United States Constitution was enacted and stated succinctly that no person should be deprived of his life, liberty or person without due process of law. That traditionally, over the years, the constitutional concepts have been altered, changed, amended and many of the decisions of ancient vintage have now been overruled. There is no real criteria that can tell us with certainty that a decision in 1830 should never be altered or reversed, or visa versa; that decisions rendered in the last term of the United States Supreme Court shall be the law of the land in perpetuity. Times, circumstances and problems change; certainly, nothing is more evident than the great transition and change between the rural America of 1870 and the urban America of 1970. In any event the Supreme Court of the United States, in

a series of cases, has, one by one, by a period of incorporation, applied the various Bill of Rights concurrently applicable to both State and Federal activities.

A Mr. Paul C. Bartholomew, in an article in the American Bar Journal of February, 1964, page 139, attempted to trace the development of what he called the Gitlow Doctrine, or the gradual but certain application of the Bill of Rights to state activities. The author points out that the Gitlow Doctrine, as he calls it, is the result of the Supreme Court decision of Gitlow v. New York, 268 U.S. 2652 (1925), wherein the court held that the 14th Amendment protects those specific guaranties of the Bill of Rights which are regarded as fundamental not merely convenient or nice to have. The Supreme Court of the United States held that freedom of speech and press is a fundamental right of the citizenry of the United States. This same author, in another article in the Journal, Vol. 54, page 785 (Aug. 1968) revisits Gitlow again in an article entitled "The Gitlow Doctrine Down to Date", and sets forth succinctly one by one how the Supreme Court has incorporated the Bill of Rights as fundamental rights to be enjoyed by all of the citizenry and to protect its citizens from State action. Mr. Bartholomew, in the conclusion of his article on page 787, presents his readers with the following:

> "This is it for the specifics of the Bill of Rights. What the Court will 'find' in the 'glittering generalization' of the Ninth Amendment is at this point an unknown quantity. That amendment may prove to be a 'gold mine'. But obviously,

> not much remains for the Court to work on in the 'first eight'. Practically speaking, there remain grand jury indictments, double jeopardy, civil suit juries and excessive bail and fines. By the cumulative process, the 'absorptionists' of Adamson appear to have won."

It is interesting to note that even though this article was published in 1968, he concludes that practically speaking all of the rights guaranteed by the Bill of Rights have been held applicable to the States except grand jury indictments, double jeopardy, civil suit juries, and excessive bail and fines. Since the publication during its last term, the Supreme Court applied two of those remaining rights to the States, to-wit: double jeopardy in the case of Wall v. Florida, 397 U. S. 387, 90 Sup. Ct. 1184 (April, 1970); and excessive bail and fines in the case of Williams v. Illinois, 90 Sup. Ct. 2018 (July, 1970).

One of the remaining two rights, to-wit: The right to have a civil jury system preserved in Louisiana is the core of this action.

The United States Congress in enacting Rule 38 of the Code of Federal Civil Procedure appears to have incorporated the Seventh Amendment into that rule insofar as it effects trials by jury into Federal system. As a result of this there has been a gradual evolution in applying the constitutional right of trial by jury in matters of equity as distinguished from common law. Illustrative of this are the cases of Becon Theater vs. Westover, 359 U. S. 500, 79 S. Ct. 948 (1952); Dairy

Queen vs. Wood, 369 U. S. 469, 82 S. Ct. 894 (1962); Ross vs. Beanhard, 396 U. S. 531, 90 S. Ct. 733 (1970).

The Louisiana system of Appellate review only perpetuates that which was held illegal and unconstitutional in criminal matters by this court in the recent case of Duncan vs. La., 391 U. S. 145, 88 S. Ct. 1414 (1968).

It is uncanny that the same person aggrieved by the same injuries may litigate his case in the Federal Courts on Royal Street in New Orleans and be constitutionally guaranteed the right to a trial by jury with no review of facts; and this same person may seek the same relief on Loyola Avenue in New Orleans some six blocks away and is constitutionally deprived of a right to trial by jury and even if he is successful in obtaining a jury verdict having the same reversed by the appellate court on the questions of fact.

It is respectfully submitted that the issue raised in this law suit involve basic constitutional rights as to whether the Supreme Court of Louisiana by State action has deprived the Davis children of minimal due process in contravention of the 7th and 14th Amendment of the United States Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

CARROLL D. VAN GEFFEN
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New Orleans, Louisiana 70130
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Carroll D. Van Geffen, a member of the bar of the United States Supreme Court, certify that at least one copy of the foregoing petition for certiorari has been served on the adverse party by depositing same in a U.S. mail box, with first class postage prepaid, addressed to counsel's last known address in New Orleans, Louisiana.

Mr. Paul Cassissa
Room 829
Maritime Bldg.
New Orleans, La.

Mr. Charles E. Richards
DeMontluzin Bldg.
234 Loyola Avenue
New Orleans, La.

New Orleans, Louisiana, this ____ day of April, 1971.

CARROLL D. VAN GEFFEN

APPENDIX A

VERDICT OF JURY

Filed: Jan. 30, 1966

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 435-437 DIVISION "E" DOCKET: 4

CHARLES DAVIS INDIVIDUALLY AND ON
BEHALF OF HIS MINOR CHILDREN
CHARLES DAVIS, JR. AND JERRY DAVIS

versus

ROYAL-GLOBE INSURANCE COMPANY AND
LOUIS C. PHILIPS

This cause came on for trial by jury on January 22, 1968, January 23, 1968 and January 24, 1968.

PRESENT:

George C. Stringer, Jr. of Stringer & Manning, attorneys for plaintiffs; and Millard Clark, Jr.

Emile L. Turner, Jr. of Bernard, Micholet & Cassisa. attorneys for Louis C. Philips and the Globe Indemnity Company, erroneously labeled as Royal-Globe Insurance Companies, defendants; also Paul V. Cassisa

AND THE FOLLOWING JURORS:

Hilton Elbert Jones
Joseph Anthony Haines
Frederick William Kraemer, Jr.
Raymond Leasure Coleman
Julius M. Rowzee
Walter Berry Lott
Leon Anthony LeBlanc
Mrs. Louise S. Shadix
Harold Willie Green
Herman Wilfred Schenck
Earl Joseph Fogarty
Marion Charles Guillot

When, having heard the pleadings, the evidence and the argument of counsel and the charge of the Court having been delivered to them, the jurors retired to deliberate, and thereafter they returned into Court and through their foreman tendered the following verdicts:

"We, the Jury, find a verdict in favor of plaintiff, Mrs. Pauline Davis on behalf of her minor son, Charles Davis, Jr. and against defendants Royal-Globe Insurance Companies and Louis C. Philips, jointly and in solido in the full sum of $115,000.00 and for all costs."

/s/ Louise S. Shadix
Foreman

"We, the Jury, find a verdict in favor of plaintiff, Mrs. Pauline Davis on behalf of her minor son Jerry Davis and against the defendants Royal-Globe Insurance Companies and Louis C. Philips, jointly and in solido in the sum of $2,500.00 and for all costs."

/s/ Louise S. Shadix
Foreman

Whereupon, counsel for the defendants asked that the jury be polled and the Court so ordered and the jury, having been polled, were found to stand as follows:

FOR THE VERDICT THAT THERE WAS NEGLIGENCE:

Hilton Elbert
Leon Anthony LeBlanc
Joseph Anthony Haines
Mrs. Louise S. Shadix
Frederick William Kraemer
Raymond Leasure Coleman
Herman Wilfred Schenck
Julius Mansell Rowzee
Earl Joseph Fogarty
Walter Berry Lott
Harold Willie Green

AGAINST THE VERDICT ON NEGLIGENCE:

Marion Charles Guillot

FOR THE VERDICT ON CHARLES DAVIS, JR.:

Hilton Elbert Jones
Leon Anthony LeBlanc
Joseph Anthony Haines
Mrs. Louise S. Shadix
Frederick William Kraemer, Jr.
Herman Wilfred Schenck
Julius Mansell Rowzee
Earl Joseph Fogarty
Walter Berry Lott
Marion Charles Guillot

AGAINST THE VERDICT ON CHARLES DAVIS, JR.:

Harold Willie Green
Raymond Leasure Coleman

FOR THE VERDICT ON JERRY DAVIS:

UNANIMOUS

Whereupon, counsel for plaintiffs requested that the verdicts of the jury be recorded and entered as the

judgment of this Court, and the Court ordered that judgment be rendered and entered in accordance therewith.

New Orleans, Louisiana
January 24, 1968

No. 435-437
DAVIS VS ROYAL-GLOBE
INS COS ET AL
DIVISION "E"

FORMS OF VERDICT

1. We, the Jury, find a verdict in favor of plaintiff, Mrs. Pauline Davis on behalf of her minor son, Charles Davis, Jr. and against defendants Royal-Globe Insurance Companies and Louis C. Philips, jointly and in solido in the full sum of $115,000.00, and for all costs.

(Signed) LOUISE S. SHADIX
FOREMAN

2. We, the Jury, find a verdict in favor of plaintiff, Mrs. Pauline Davis, on behalf of her minor son, Jerry Davis and against the defendants, Royal-Globe Insurance Companies and Louis C. Philips, jointly and in solido in the sum of $2,500.00 and for all costs.

(Signed) LOUISE S. SHADIX
FOREMAN

APPENDIX B

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

CHARLES DAVIS, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, CHARLES DAVIS, JR. AND JERRY DAVIS

versus No. 3485

ROYAL-GLOBE INSURANCE COMPANIES and LOUIS C. PHILIPS

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 435-437, DIVISION "E", HONORABLE HOWARD J. TAYLOR, JUDGE.

PAUL E. CHASEZ
JUDGE

(Court composed of Judges Paul E. Chasez, Luther E. Hall and Leon J. Le Sueur.)

STRINGER, MANNING & ST. PEE, JAMES O. MANNING, ATTORNEYS FOR CHARLES DAVIS, *PLAINTIFF-APPELLEE.*

BERNARD, MICHOLET & CASSISA, PAUL V. CASSISA, ATTORNEYS FOR GLOBE INDEMNITY COMPANY and LOUIS C. PHILLIPS,
DEFENDANTS-APPELLANTS.

AFFIRMED

This is an action for personal injuries suffered by the minors Charles Davis, Jr. and Jerry Davis, allegedly resulting from the ingestion of paint flakes which had fallen from the inside of the apartment in which they had been living. The defendants in this suit are Louis C. Philips, the owner and landlord of the premises, and his insurer, Globe Indemnity Company, erroneously identified as Royal-Globe Insurance Companies in plaintiff's petition. After trial by jury judgment was returned in favor of the children in the amount of $115,000.00 for Charles Davis, Jr. and $2,500.00 for Jerry Davis. Defendants have taken this appeal.

Defendants filed the peremptory exception of no cause of action in the trial court; this exception was considered and overruled below. Defendants have reurged this exception in their appeal, thus we find initially we are relegated to a consideration of this exception herein.

The petition filed in behalf of the minor children, initiating the suit alleges that on or about May 13, 1964 the minor children Charles Davis, Jr. and Jerry Davis, then age three and two respectively, became violently ill while playing in their home. They were taken to a local hospital where their illness was diagnosed as acute lead poisoning.

The petition further averred that the defendant, Louis C. Philips, the owner and landlord of the premises in which the children became ill, was negligent in failing to keep the premises in repair, specifically in that he allowed the apartment to deteriorate into such a rundown condition that the paint began to flake and fall from the walls and ceilings to the floor, and that as a result of this negligence the children living in the apartment had occasion to eat paint flakes on the floor, causing the lead poisoning which resulted in serious and permanent injuries.

Defendants contend that even accepting these facts as established, which they strenuously deny; no cause of action has been shown for which relief can be granted. They argue that a landlord cannot be held for injuries to the children of his tenants, when these injuries are a result of an unusual and extraordinary use of the premises which the landlord could not reasonably foresee. In support of this argument the defendants rely heavily on the recent case of Montgomery v. Cantelli, 174 So.2d 238, La. App. 4 Cir. 1965, (Writ denied) of this Circuit. The facts of that case are somewhat similar to those before us herein. There a three year old child picked off and ate dry and flaky paint from the outside of the front door of the leased premises. As a result of this action the child contracted lead poisoning.

We made these statements in maintaining defendant's no cause of action exception:

"[1] We are convinced that the defendant was not at fault in merely permitting dry or flaky paint to remain on the front door of the premises. Obviously, it would be too great a burden to impose upon a lessor, that is, the obligation of maintaining the exterior of his property so as to avoid the occurrence thereon of dry or checked paint, particularly when we consider the nature of the climate which prevails in this vicinity. We are equally convinced that the defendant herein could not have reasonably foreseen that a child would pick paint flakes from the door and eat them.

"In view of what we have said hereinabove, we are of the opinion that the petition does not disclose a cause of action against the defendants predicated on an accusation of negligence.

* * * *

[3-5] It is equally clear that a lessor is not an insurer of the safety of his tenants. His liability may not be extended so as to include damages for injuries resulting from an abnormal and unexpected use of the property. If that portion of the premises causing the injury would be safe if used in the manner in which the lessor is entitled to assume it will be utilized, he may not be held liable for injuries incurred by an unreasonable or extraordinary use thereof.

> "To reiterate, it is abundantly clear that the defendant cannot be made to respond in damages for the injuries sustained by the Montgomery child. It would be ludicrous to expect the lessor to protect the lessee or any member of his family from injuries incurred as a result of eating a portion of the premises. Such gastronomic culinary impulses are, to say the least, abnormal and unexpected, and could not reasonably be anticipated by the lessor. Therefore, we are led to the inevitable conclusion that the defendant is not liable for the very unusual injury incurred by the plaintiff's child."

It is argued on behalf of the minor children however that the Montgomery decision does not control the instant situation. The basis presented for distinguishing this case centers on the fact that in the present case the young children picked up and ate paint flakes from *the floor* of the *inside* of the rented premises. The mother of the children, Pauline Davis, testified the paint began to peel and fall from the walls and ceiling a short time after she moved into the apartment in December of 1963. She stated she notified the landlord's resident manager on the premises about this condition several times but no effort was made to correct it. She stated she noticed her children eating the fallen flakes on two or three occasions and each time she stopped them from doing so.

In Acosta v. Irdank Realty Corp., 238 N.Y. So. 2d 713, a child suffered lead poisoning from ingesting, over a period of months, paint and plaster which had

peeled from the inside walls and ceilings of her parents' leased apartment. The Court found in that case that the owner of the multiple dwelling apartment in which the incident occurred had violated the local law by failing to keep his premises in proper repair, and the injury to the child was a foreseeable consequence of that violation, thus he was liable in damages to the child and her parents.

The Court made these observations in granting judgment for the plaintiff:

> "Was this occurrence reasonably foreseeable within the meaning of the law? The defendant takes the position that it was not.
>
> "That small children go around the house picking up everything within their reach and placing it in their mouths and attempting to eat it is well known. They often have a craving to put in their mouths and eat most unusual things. It would not be unreasonable, therefore, to foresee that Yvette would pick up pieces of plaster and paint if they were lying around and eat them. On the other hand, it is well known that paint contains lead which may cause lead poisoning to anyone ingesting it."

In another case dealing with somewhat the same circumstances, with the exception that the eaten plaster originated not within the tenants' apartment itself but rather in a common hallway which serviced the

apartment, the Court made these observations about the Acosta case:

> "However, there is one very significant difference between the Acosta case and this one. In the Acosta case, the defective walls were those of the apartment in which the child lived with her parents (defendant's tenants) and, of course, her presence there was known and expected. The landlord had the duty to keep the interior walls of the apartment in proper repair under the New York Multiple Dwelling Law and the court found the existing condition was in violation of that law. In this case, the defective condition was in a common hallway and it is not alleged that such small children as plaintiff were ever in the hallway alone or allowed to play there or that defendant had any notice of the presence of such small children there or any reason to expect them to be in the hallway without an older person in charge.
>
> * * * *
>
> "Therefore, while defendant had a duty to his tenants and members of their families to repair the condition shown, to prevent injury from external contact with falling or fallen plaster, the decisive question here is: Under the facts alleged, did defendant have the duty to plaintiff to prevent, by repairs or removal

of the plaster, the kind of injury plaintiff sustained?

* * * *

"The Restatement of Torts, as to legal cause, says in Sec. 431: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bring about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' As to foreseeability, the Restatement in Sec. 435 says: (1) 'If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.' See Phillips v. Stockman, Mo.App., 351 S.W. 2d 464, 474 and cases cited; Tharp v. Monsees, Mo.Sup., 327 S.W. 2d 889, 894.

"In 1948, the following was added to Sec. 435: '(2) The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.' (Restatement 1948 Supplement, p. 736.) Comment d, concerning this added provision states: 'A result of the actor's tortious conduct may be one which, either in its

extent or the manner in which or the sequence of events through which the conduct operates to bring about the harm, is altogether different from the result which the actor at the time of his negligence recognized or should have recognized as likely to result therefrom. None the less, after the event, such a result may not appear to the court to be so highly extraordinary as to prevent the actor's conduct from being considered a legal cause of it. What the actor does or should expect depends upon the circumstances which he knows or should know and his forecast in the light of these circumstances as to what is likely to happen. The court's judgment, as to whether the harm is a normal or highly extraordinary result, is made after the event with the full knowledge of all that has happened.' Comment e is: 'It is impossible to state any definite rules by which it can be determined that a particular result of the actor's negligent conduct is so highly extraordinary as to prevent the conduct from being a legal cause of that result. This is a matter for the judgment of the court formulated after the event, and therefore, with the knowledge of the effect that was produced.' See also 2 Law of Torts, Harper and James, 1134-1151, Sec. 20.5.

"Looking back from the harm to plaintiff to defendant's negligent conduct, our view is that the result (plaintiff being in the hallway

> and sustaining injury by putting fallen plaster in her mouth) does appear to be so highly extraordinary, under the facts alleged, as to prevent defendant's conduct from being considered the legal cause of it, when there is nothing in the petition to show that defendant knew or had any reason to expect that such small children would be in the hallway unattended. We, therefore, hold the trial court reached the correct result in dismissing plaintiff's petition."

Again we note the important distinction made in this case as to the place the injury occurred, as was made in Montgomery v. Cantelli, supra, that is the children in both situations ate the paint and plaster which had flaked or fallen outside of the leased premises itself. We can see how it would be unreasonable to hold a landlord for the actions of children in eating such foreign material in those situations; however it does not seem unreasonable to place a greater burden upon him to keep this condition from occurring within the premises itself when it is known that small children will thereby be constantly exposed to the temptation of eating this fallen material.

We hold therefore that in such a situation as we have here the petition filed on behalf of the minor children, Charles and Jerry Davis, has stated a cause of action and we must turn therefore to a consideration of the sufficiency of the evidence presented to jury, to ascertain if they were correct in returning a judgment for the children.

Appellants contend that the evidence in the record before us is insufficient to prove that any alleged negligence on the part of Mr. Philips was the proximate cause of the injuries to the young Davis children. We find after a careful review of all the evidence, that we cannot agree with this contention.

Pauline Davis testified that she moved into defendant's apartment house in December, 1963. She lived in a front apartment there for about a month when she decided to move to the rear unit in the same building where the incident in question occurred. After moving into this apartment she noticed that the paint was beginning to flake off and fall from the ceilings and walls.

She testified as follows on direct examination:

"Q. Was there any paint coming off the ceilings or walls of the place you were living?
"A. Yes, there was.
"Q. What did you do when you saw this paint or noticed it on the floor?
"A. Well, I would sweep it up.
"Q. When you were not present who was present with the children?
"A. Uh, Mrs. Davis was.
"Q. That's your mother-in-law?
"A. Yes.
"Q. Did you, while you were living in this apartment for some five months, ever see your children with paint in their hands?
"A. Yes, I did.

"Q. What did you do?
"A. I would spank them and correct them.
"Q. Did you see any in their mouth?
"A. Yes, several times.
"Q. What did you do then?
"A. I would try to take it out of their mouths.
"Q. Did you ever notify the landlord of this condition?
"A. I notified the lady that attended to the house.
"Q. Do you recall, Mrs. Davis, if you can it's a long time ago, the name of that lady?
"A. Her name is Catherine La Fleur, or something like that.
"Q. Did she live on the premises?
"A. Yes, she did.
"Q. Did you make complaints to her about the condition of your apartment?
"A. Yes, I did, several times.
"Q. Did you ask her to do something about it?
"A. Yes, she said she would.
"Q. Was anything done while you were living there?
"A. No, it wasn't.
"Q. You never did speak to Mr. Philips himself, did you, about this matter?
"A. No, sir, he left Catherine attend after the house."

Plaintiffs expert witnesses testified that they tested several samples of paint flakes taken from the inside of the apartment in question. Two of these samples taken from the bedroom walls and ceilings showed neg-

ligible traces of lead; however a third sample taken from the kitchen ceiling revealed a lead content of 10.55% in one layer of paint on the ceiling.

Further plaintiff introduced photographs taken of the kitchen ceiling which showed a considerable amount of paint flaking from the ceiling.

Plaintiffs medical witnesses diagnosed the children's condition as lead poisoning, on the basis of the blood tests and x-rays taken in the hospital.

Dr. Pierre Espenan, the children's treating physician stated:

BY MR. MANNING:

"Q. Based upon the examination, blood test, x-rays and diagnosis, could you with reasonable medical certainty tell us what caused Charles' condition?

"A. Yes, he had to get lead into his system over approximately a six or eight-month period and the most likely way from the history that the parents afforded us was eating lead."

We find that the above evidence was suffi ient for the jury to determine that the Davis children had contracted lead poisoning from ingesting paint flakes over a period of almost five months, which originated from the inside of the defendant's premises. Certainly given this evidence we are not in a position to reverse the decision of the jury on a factual basis.

Defendants contend that the flaking paint condition was never reported to Mr. Philips, the owner of the apartment. They argue that he was a good landlord who always kept a close watch on this rented premises. Philips presented the testimony of his handyman who stated that he had painted these premises on numerous occasions whenever they were in need of it.

We note however that the lady identified by Pauline Davis as the manager of the particular apartment, Catherine La Fleur, was not called upon to testify by the defendants to contradict Mrs. Davis' contention that she had complained several times about the flaking paint. Without considering the presumption which arises from the defendant's failure to offer her testimony, we must note that this leaves Mrs. Davis' testimony uncontroverted on this point.

Thus while Mr. Philips denied any direct personal knowledge as to the proven condition of his apartment, the plaintiff has successfully proven that he had constructive knowledge through his own apartment manager.

In recognizing the cause of action as alleged herein, and in affirming a judgment against the defendants, we are not unmindful of the danger that our decision will be used as a basis for suits against landlords for any and all injuries which are sustained on their premises. We can only state that landlords are not the insurers of the safety of their tenants. Only when a tenant is injured by an accident which occurred from the landlord owner's neglect to maintain the building in a safe and livable condition,

or from a vice or defect or original construction, provided the injury does not result from a defective condition which the tenant himself did not have the obligation to keep in repair, will the owner-landlord be subject to liability.

The question has been raised in our minds about the actions of Pauline Davis herself in this matter, since after all it is admitted and indeed alleged by her that her small children ate paint flakes many times over a four or five month period. Indeed it could be argued that while the children themselves could not be guilty of contributory negligence, nevertheless Pauline Davis herself as their mother and guardian was negligent in not keeping a proper watch over her children, and it was her negligence which was the cause of their injuries. We realize that the contributory negligence of the parent cannot be imputed to the minors so as to defeat their recovery. Kleibert v. Marquette Casualty Company, 119 So.2d 545; however we can envision a situation where it is the superceding negligence of the parent in failing to keep a proper lookout for the child's wellbeing which is the actual proximate cause of the child's injury.

In any event we are satisfied that such was not the case herein. Pauline Davis testified as seen above that each time she noticed her children eating the paint flakes she stopped them from doing so by spanking their hands and instructing them not to do so again. Naturally being small children they persisted whenever her back was turned. Further she stated that whenever she noticed paint flakes on the floor she swept them up. She complained to the apartment man-

ager on several occasions and even asked if she could buy paint herself and correct the condition. The record establishes she was a woman of meager means and education, yet she did everything she could to prevent the situation from continuing except moving from the apartment, which we must assume she would have done had she been aware of the serious nature of the consequences to her children. Unfortunately for them, however, the lead poisoning was not evident to their own doctor until the damage had been done, and it was then that the Davis family moved from the premises.

We turn now to a consideration of the defendants' peremptory exceptions of no right of action, or interest to sue, and of prescription which were filed during the trial of this matter below. The record reveals that the original petition in this suit was filed on May 5, 1965 by Charles A. Davis, Sr. on behalf of his minor children. On January 16, 1967 on motion of Charles A. Davis, Sr., Pauline Green Davis, the mother of the children, was ordered substituted as party plaintiff in these proceedings. Further on that date Pauline Green Davis filed an application in the record wherein she prayed for and was granted the appointment as provisional tutor of her minor children. She alleged that she was the natural mother of these children and Charles A. Davis, Sr., who was the natural father, had never qualified as their tutor. Then during the trial, Pauline Davis testified that she had never been married, that the children were in fact the illegitimate issue of her common-law union with Charles A. Davis, Sr. The defendants subsequently filed the peremptory exceptions of no right of action and prescription re-

ferred to above, but they were overruled by the trial judge.

The thrust of defendants exceptions is directed to the fact that Charles A. Davis Sr., in his individual capacity for and in behalf of the minor children was never the proper party to bring this suit, thus had no right of action or interest to sue. Further the petition filed by him on May 5, 1965 could therefore not have the effect of interrupting prescription, and Pauline Green Davis' action in substituting herself a party plaintiff in her capacity as natural tutrix came too late as the suit was then prescribed.

We will deal first with defendants exception of no right of action. Apparently defendants have confused the peremptory exception of no right of action or interest in plaintiff to sue, under LSA-C.C.P. art. 927, with the dilatory exception of lack of procedural capacity under LSA-C.C.P. art. 926.

In Jefferson v. Jefferson, La., 246 La. 1, 163 So.2d 74, Justice Sanders quoted at length from an article by the late Dean Henry G. McMahon in Tulane Law Review on this subject as follows:

> ' * * * [The] exception of want of capacity is deemed the proper and only medium of putting the authority of the plaintiff at issue whenever he appears in a representative capacity, whether as mandatary, tutor, (or for the ' "use and benefit ' " of a minor without qualifying as tutor and without facts showing that plaintiff is the administrator of the estate of such

> minor), curator, administrator, executor, receiver, liquidator, or syndic. This exception appears to be the proper method of putting the procedural capacity of the plaintiff at issue where he appears in an individual capacity, whenever it is contended that for any reason the plaintiff is not sui juris." '

* * * *

Unquestionably Charles A. Davis, Sr. as the natural father of the minor children was not the proper party in his individual capacity to bring this suit. A dilatory exception raised any time before answer would certainly have been maintained and either he or Pauline Green Davis would have been required to qualify as tutor before continuing with the action.

However the exception was not raised until after answer, and until after Pauline Green Davis had cured the procedural defect by qualifying herself as provisional tutrix and substituting herself as the party plaintiff in this capacity for and on behalf of her minor children. Hence for both reasons the exception of lack or procedural capacity, the only one ever proper in this situation, was filed too late and had become for all purposes moot.

We are left however with the more difficult problem of prescription. This exception was filed on the last day of trial of the case. Stated simply, the question becomes: did the action of Charles A. Davis, Sr. in filing his petition admittedly without the procedural capacity to do so, have the effect of interrupting and

suspending the tolling of prescription in this case? We find we must answer that question in the affirmative.

In Nettles v. Great American Insurance Company, 155 So.2d 87, La. App. 1 Cir. 1963, (Writ denied) an analgous situation was presented to the Court. In that case a father filed suit on behalf of his son for personal injuries suffered by his son in an automobile accident. The petition was filed however after the son became twenty-one years of age, subsequently the defendant filed the peremptory exception of no right of action on the basis that the son was a competent major at the time of the filing of the suit and he was the only party who had a right to pursue the case.

The exception was maintained but the son was given 15 days within which to substitute himself as party plaintiff. This was done; however, by then the one year prescriptive period had elapsed from the date of the accident.

The defendant then filed a plea of prescription alleging that as the father was without procedural or representative capacity to bring suit on behalf of his major son, the filing of the suit by the father did not serve to interrupt prescription, and the suit had thus prescribed by the time the son substituted himself as proper party plaintiff more than one year after the accident.

In deciding that the suit by the father for his son did interrupt prescription even though the father was without the procedural capacity to bring the suit, the Court cited with approval and quoted from the cases

of Ray v. Liberty Industrial Life Insurance Company, La. App. 180 So. 855, 856 as follows:

> " ' In 9 Tulane Law Review, page 286, in an article entitled '" Prescription — Interruption," ' appears the following: '" * * * Numerous cases have held that although there is some mistake as to the parties plaintiff, nevertheless the suit will interrupt prescription. Blanc v. Dupre, 36 La. Ann. 847, supra (suit by curator of succession whose appointment was null); Flower v. O'Connor, 1841, 17 La. 213 (suit by surviving partner of a firm who was non-suited because of lack of authority to represent the others); Becnel v. Waguespack, 1888, 40 La. Ann. 109, 3 So. 536 (suit by one co-owner for damage by trespass); Wolf & Sons v. New Orleans Tailor-Made Pants Co., 1903, 110 La. 427, 34 So. 590 (suit by individuals in their own names for tort to commercial partnership). This is in line with the French jurisprudence, in that the plaintiff need not have the capacity to sue in order to interrupt prescription. Huc, Commentaire du Code Civil XIV (1902) No. 386, p. 488; Baudry-Lacantinerie et Tissier, op. cit. supra No. 484, p. 369.' "

and Andrepont v. Ochsner, 84 So.2d 63,67:

> " 'Our courts have adopted a liberal attitude free from the fatalities of technicalities in cases involving analogous situations. Where a defendant is sued in a representative capacity, such as receiver of an insolvent corporation, or

> administrator of a succession, and is later sued in his individual capacity on the same cause of action, the first suit has been held to interrupt prescription running on the demand. Succession of Saunders, 37 La. Ann.769; Vernon v. Illinois Cent.R.Co., 154 La. 370, 97 So. 493; Anding v. Texas & P. Ry. Co., 158 La. 412, 104 So. 190; Warn v. Mexican Petroleum Corporation, 6 La. App. 55; Calamia v. Mayer, La. App., 174 So. 668. *It makes no difference that the plaintiff has no right to bring the action.* Flower v. O'Connor, 17 La. 213; Bell v. Mix, 1 Rob. 393; Blanc v. Dupre, 36 La.App. 847; Becnel v. Waguespack, 40 La. Ann. 109; Boyd v. Heine, 41 La. Ann. 393, 6 So.714; Wolf & Sons v. New Orleans Tailor-made Pants Co., 110 La. 427, 34 So. 590; Ray v. Liberty Industrial Life Ins. Co., La. App., 180 So. 855.' (Emphasis added)"

Following the rationale of these quoted cases then, and of the Nettles case itself we are of the opinion that the filing of this suit by Charles A. Davis, Sr. for and in behalf of his minor children did serve to interrupt prescription in this case, even though he was without the procedural capacity to bring this suit.

Having disposed then of the exceptions filed in this matter and having decided that the judgment is correct as to the issue of liability, we turn finally to the issue of quantum raised by appellants herein. Judgment was rendered in favor of Pauline Green Davis as provisional tutrix for and on behalf of her minor child, Charles Davis, Jr. in the amount of $115,000.00

to be prorated as follows: $50,000.00 against Louis C. Philips and Globe Indemnity Company, jointly and in solido; and $65,000.00 against Louis C. Philips individually. Additionally judgment was rendered in favor of Pauline Green Davis, as provisional tutrix for and on behalf of her minor child Jerry Davis in the amount of $2,500.00 against Louis C. Philips and Globe Indemnity Company, jointly and in solido.

Defendant-appellants contend that the amount awarded in behalf of the minor child Charles Davis was grossly excessive and should be reduced to the sum of $35,000.00. They argue that this $115,000.00 award was based largely on speculative, vague and conjectural testimony by plaintiff's expert witnesses as to the amount of future loss of earnings by the child.

We agree that to support a special award in damages for loss of future wages, probabilities, surmises, speculations and conjectures cannot be accepted as sufficient grounds to justify recovery. However we note that no such special award was given in this case. Further we find that an award of $115,000.00 in favor of the minor child, Charles A. Davis, Jr., was not excessive for his pain, suffering and total disability in view of the terrible injuries which he has suffered.

Several medical witnesses testified as to the nature of the crippling injuries to the child, and the effect these injuries will have on his future life and development. Without going into great detail into these injuries, suffice it to say that prior to their occurrence Charles A. Davis, Jr. was in all respects an average

three year old child. He was able to play and converse with his family and friends and could look forward to a full and healthy life as a normal and complete human being. As a result of this occurrence he will forever mentally remain a child of three years old. In fact he has regressed in his personality to the extent that he cannot speak and no longer is toilet trained. The prognosis for improvement is extremely doubtful to the extent that it is a medical improbability that he will ever master his basic bodily functions; certainly will never be educable and probably will never be trainable in even a simple work skill. Under these circumstances we will not disturb the award of $115,000.00 which on its face may appear high, for even this amount could not begin to compensate the child for his loss.

For the reasons hereinabove set forth the judgment appealed from is affirmed in all respects, appellants to pay the costs of this appeal.

AFFIRMED.

APPENDIX C

SUPREME COURT OF LOUISIANA
Monday, June 20, 1970

No. 50,055

CHARLES DAVIS, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, CHARLES DAVIS, JR., AND JERRY DAVIS

versus

ROYAL-GLOBE INSURANCE COMPANIES and LOUIS C. PHILIPS

IN RE: APPLICATION FOR CERTIORARI, OR WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS, STATE OF LOUISIANA.

SUMMERS, Justice.

Originally this suit was instituted by Charles Davis, as the father of the minors Charles Davis, Jr., and Jerry Davis, claiming damages individually and on behalf of the minors. When it was revealed that Charles Davis was only the natural father of the children, the pleadings were amended to substitute Pauline Green

Davis, their mother, who qualified as their provisional tutrix.

Pauline Green Davis was estranged from the father of the children and came with Charles Davis' mother to New Orleans from Memphis, Tennessee, in June 1963. She rented a furnished apartment on the corner of Baronne and Felicity and secured employment as a waitress at the Walgreen Drug Store located at the corner of St. Charles and Napoleon Avenues. While she worked, the 65-year old grandmother cared for the children. Charles, Jr., was then 2-1/2 years of age, and Jerry was a year younger.

In December of 1963, Pauline moved her family to 4309-11 Prytania Street, where, for $15.00 per week, she rented a front apartment in an eight-apartment building owned by the defendant Louis C. Philips. This new location was closer to her work and away from boisterous neighbors who disturbed her peace and tranquility at Baronne and Felicity. Because her rent payments were tardy, and apparently because she was having a hard time making them, the apartment manager Catherine Lafleur suggested she take a rear apartment in the same building at a reduced rental of $12.00 a week. This move was accomplished about one month after moving to the Prytania Street address. Pauline, with the grandmother and children, occupied the rear apartment, consisting of a bedroom, kitchen and bath, until the latter part of May 1964 when an eviction notice was served upon her for nonpayment of rent. We gather from the record that she returned to Memphis soon thereafter.

Prior to her departure, however, on May 9, 1964 the child Charles, then 3-1/2 years of age, was taken to Touro Infirmary with a complaint that he had been vomiting about five days. He was seen by Dr. Ewin who prescribed amytal to settle his stomach. The doctor observed bruises and stripes on the child's buttock, which, in his opinion, resulted from a spanking with a belt.

On May 11 the child was seen by Dr. Espanen, who had been the family physician since September 1963. On May 14, Charles was again returned to the hospital, this time with convulsions. He receded into a coma and was hospitalized in the intensive care ward. His condition was diagnosed as lead poisoning. Although formerly normal, a permanent injury to the brain has resulted from the lead poisoning; and expert testimony establishes that Charles will remain retarded for the remainder of his life, and, in all probability, will require permanent institutional confinement and care after he reaches the age of puberty. The child Jerry was brought to the hospital on May 15, 1964, examined and found to have a mild case of lead poisoning. He was treated for this condition and released shortly thereafter with no residual effects.

This suit for damages was instituted on May 5, 1965 against the landlord Louis C. Philips and his liability insurer Globe Indemnity Company, erroneously referred to as Royal-Globe Indemnity Companies by plaintiffs. The claim is based upon the theory that the landlord negligently permitted paint containing lead on the ceilings of the apartment to peel, flake and fall to the floor where the flakes were eaten by the children.

Lead poisoning and the resulting injury, it is claimed, resulted from ingestion of the paint flakes.

Exceptions of no cause of action and prescription filed by defendants were overruled by the trial court. In a trial by jury, defendants were condemned to pay $115,000.00 as damages for the injuries to the child Charles Davis, Jr., prorated $50,000 against Globe Indemnity Company, the limit of its policy coverage, and $65,000 against the defendant Louis C. Philips. The sum of $2,500 was assessed against the defendants in solido as damages incurred by the child Jerry Davis. On appeal to the Fourth Circuit, the judgment was affirmed. 223 So. 2d 912. Certiorari was granted on application of the defendants to reconcile what we believed to be a conflict between this case and the decision of the Fourth Circuit in Montgomery v. Cantelli, 174 So. 2d 238 (1965). Since the record is now before us, we find the determination of fact supporting the judgment to be manifestly erroneous, and we reverse. Because we have taken this view of the matter, we need not decide the issues raised by the exceptions.

Plaintiffs' counsel urges us to impose liability upon the owner of the apartment building without reference to fault under the terms of Article 2322 of the Civil Code which provides:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

The "ruin" contemplated by this Article has reference to the actual fall or collapse of a building or one

of its components. This is the attitude in the French law and it is a view expressed in Guidry v. Hamlin, 188 So. 662, 664 (La. App. Orl. 1939), where the Article was said to have "no reference to any situation except that in which some part of the building collapses, or breaks, or gives away." See Montgomery v. Cantelli, 174 So. 2d 238 (La. App. 1965). And to satisfy the meaning of "ruin" as used in Article 2322 the fall or collapse must involve a more or less substantial component of the structure. The English text of the Louisiana Code of 1808 translates *ruine* as "falling down". Comment, 42 Tul. L. Rev. 178, 184 (1967). Article 2322 is considered a reiteration of the principle that the building must "fall" expressed in Article 670 of the Civil Code, except that it permits recovery by third persons lawfully on the premises, whereas Article 670 limits the owner's responsibility to neighbors and passers-by.[1]

Falling paint flakes from an apartment ceiling were never intended by this article to be considered the "ruin" of a building, which would impose the unduly harsh burden of absolute liability upon the owner. Where it is alleged, as here, that the injury is to a third person lawfully on the premises from a dangerous condition which the lessor has permitted to exist, then the appropriate basis for the decision is Articles

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[1]La. Civil Code Art. 670 provides: "Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers, under the penalty of all losses and damages, which may result from the neglect of the owner in that respect."

2315 and 2316. Comment, 39 Tul. L. Rev. 798, 837 (1965); Comment, 16 Tul. L. Rev. 448, 449 (1942); Comment, 7 La. L. Rev. 406 (1947).

Apparently the only persons present in the apartment who could testify that the children ate paint flakes from the ceiling were the mother and grandmother. Only the mother testified, and the grandmother's failure to testify is not explained. Proof of this fact, therefore, depends almost entirely upon the mother's testimony and the additional fact that an opaque fleck appeared on an X ray of Jerry's lower stomach taken when he was brought to the hospital on May 15, 1964. In the opinion of the doctors who testified, this opaque fleck could be a foreign particle in the X ray developing fluid or a paint flake with plaster adhering to it. However, the child's feces were not examined to verify the supposition that the flake was paint.

Pauline's testimony is to the effect that, about three months after she moved into the back apartment, "just all of a sudden" she noticed paint flakes on the floor in the bedroom. Thereafter, on several occasions, she saw the children with paint flakes in their hands or mouths. When she saw this, she removed these objects from their mouths. She testified, also, that she notified the resident manager Catherine Lafleur that the paint was peeling and falling from the ceilings of the apartment, but nothing was done to correct the condition. Catherine Lafleur was not called to testify, and her failure to do so remains unexplained by either plaintiffs or defendants. The weight of Pauline's testimony

would have been considerably enhanced by corroboration on this point.

Although at the trial Pauline insisted that the paint fell from the ceiling, on May 14, 1964 when Charles, Jr., was brought to the hospital in convulsions, and the treating physician Dr. Espanen asked her what the child could have been eating to cause his stomach pains, she replied that it could possibly be plaster or paint flakes; and when he asked her to bring in samples of the paint, she brought him samples from the walls of the apartment.

As already noted, a month after Pauline Davis moved with her children and their grandmother to the Prytania Street address, they moved into the rear apartment. They had occupied the front apartment for a month, but there is no claim or testimony that the paint was peeling and falling to the floor in that apartment. This would mean that she occupied the rear apartment where the paint is alleged to have fallen from the ceiling beginning about January 30, 1964. It was three months after this before she noticed paint flakes falling to the floor, which would mean that it was the end of April before there was any probability that the children began eating them, barely two weeks before Charles, Jr., went to the hospital with convulsions on May 14, 1964.

In addition to Pauline's testimony as to when the paint eating started, the family physician who ordinarily treated the children testified that the child Charles, Jr., was seen by him in September 1963, during December 1963, and on May 11, 1964 at which times

the diagnosis was tonsillitis, gastroenteritis and milk anemia, the latter two conditions beng symptoms associated with lead poisoning. Still, at no time during these examinations did the mother or grandmother report paint eating by the children. And, as this testimony discloses, the symptoms existed before the children moved into the defendant Philips' apartment.

The May 11 examination by Dr. Espenan followed the May 9 visit already mentioned when Dr. Ewin saw Charles, Jr., and prescribed for the stomach disorder. On neither of these occasions did the mother give a history of paint eating. It was only when Dr. Espenan asked her about the ingestion of foreign materials on May 14 that she stated Charles had eaten large quantities of material from his room, which had fallen into his crib from the wall. Later the mother admitted she had no crib, but a rollaway bed kept in the bedroom, and, as already noted, at the trial she testified the paint flakes fell from the ceiling.

From the foregoing, it is indicated that the children could not have eaten paint from the apartment in question for much more than two weeks, allowing for discrepancies in time estimates in Pauline Davis' testimony. Medical testimony, however, establishes that the ingestion of paint flakes under the circumstances outlined here would have to take place, according to Dr. Espanen the treating physician, over a period of six to eight months. Dr. Chetta, the Orleans Parish Coroner, whose qualifications in toxology and experience with lead poisoning are particularly impressive, was of the opinion that the ingestion of lead in this manner would have to extend over a period of one

year to eight months in order to bring on the acute condition Charles, Jr., experienced.

Only the testimony of Dr. Kern, who treated Charles, Jr., after the convulsions, seems to be to the contrary. He appeared to be of the opinion that the lead poisoning was consistent with a history indicating that the child had been eating paint flakes for five or six weeks. We are inclined to believe, however, that there may have been some inadvertent discrepancy in the history he refers to in his testimony and the history upon which his opinion was based. In any event, because of these inconsistent opinions of the doctors, we accept Dr. Chetta's and Dr. Espanen's opinions, which, if combined, would require the consumption of paint flakes over a period of from six to twelve months before the acute condition suffered by Charles could occur.

Paint samples were requested by the doctors in an effort to determine the cause of the lead poisoning. First Pauline was asked by Dr. Espenan to bring in samples. The samples she produced were scraped from the *bedroom* wall shortly after May 13 and tested negative for lead. Thereafter, in November 1964, plaintiffs had samples from the *bedroom* ceiling and walls tested again, and again no lead was found. Then, on January 11, 1967, two months before the trial and almost three years after the diagnosis of lead poisoning in May 1964, plaintiffs employed an investigator who obtained samples from the ceiling of the *kitchen* which revealed a lead content. In the paint sample thus obtained, there were five layers of pink paint, none of which contained lead; but under these were seven layers of green paint containing 10.55 percent lead.

Philips the landlord acquired the property in question in 1948. He is a practicing attorney and did not ordinarily manage this or his other properties in person. He produced as witnesses his son who helped to manage his apartments and Newman Jones who repaired the apartment in question and other apartments owned by Philips. Jones described in detail his practice over a period of many years of cleaning the apartments for Philips whenever occupancy changed. The procedure was to clean the plaster walls, scrape all loose plaster and paint, repair damaged areas, sandpaper and then repaint the room in whole or in part with a nonlead paint. It was an invariable practice never to use lead paint inside the building. Lead paint had never been used in the apartment since it was acquired by Philips. A hardware dealer, from whom all materials had been purchased for many years for use on the Philips properties, verified this fact.

Although plaintiff's son, who collected rents, testified that it was not unusual for paint to peel from the plastered walls of old structures in New Orleans built like the one occupied by Pauline, he had no recollection of any unusual condition in the apartment she occupied.

A photograph of the kitchen ceiling taken on November 11, 1964 does not depict it to be in a deteriorated or neglected condition. It appears to be in the condition which could be expected of a furnished apartment which rents for $12 per week.

Based upon the evidence in the record, we cannot agree that plaintiffs have succeeded in discharging the

burden of proof by a preponderance of the evidence to a legal certainty that defendant Philips breached the standard of care owed by a landlord to the child of his tenant. Thus we are unable to find that he was negligent in maintaining the premises. Moreover, we are not satisfied that enough paint flakes fell to create a dangerous condition in the apartment. Nor do we find that lead paint from the Philips apartment was eaten by the children for a sufficient length of time or in sufficient quantities to cause the lead poisoning they suffered.

The judgment is reversed, and the suit is dismissed at plaintiffs' cost.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1610

CHARLES DAVIS, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, CHARLES DAVIS, JR. AND JERRY DAVIS,

Petitioners,

versus

ROYAL-GLOBE INSURANCE COMPANIES (GLOBE INDEMNITY COMPANY) AND LOUIS C. PHILIPS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Respondents, Globe Indemnity Company and Louis C. Philips, in opposition to the Petition of (Mrs.) Charles Davis for Writ of Certiorari to the Supreme Court of the State of Louisiana, with respect, shows:

OPINIONS BELOW

The JUDGMENT of the Civil District Court for the Parish of Orleans, State of Louisiana, dated January 30, 1968, is not published. (Only the "verdict of jury" is included in the appendix of petitioner's brief seeking this Writ.)

The Opinion of the Fourth Circuit Court of Appeals for the State of Louisiana is reported at 223 So. 2d 912.

The Supreme Court of Louisiana Opinion is reported at ____ La. ____, 242 So. 2d 839. (Respondents maintain that this decision of the highest Court of the State of Louisiana was based not only on "appellate review of facts," but also on very crucial POINTS OF LAW, namely the applicability vel non of Louisiana CIVIL CODE Articles 2322, and 670, and the **legal** interpretations of said statutes by the State Courts!)

QUESTIONS PRESENTED

Properly stated, Respondents submit the questions presented are:

1. Does the Seventh Amendment of the United States Constitution apply **to the State Courts,** on a "State-created cause of action"?

2. If applicable, then does the said Seventh Amendment prohibit State Court appellate review of "both the law and the facts," as provided by Louisiana Constitution Article 7, Section 10?

3. If applicable, did the specific action of the Louisiana Supreme Court, in this case at bar, violate said Seventh Amendment?

STATEMENT OF THE CASE

On May 5, 1965, the original petition was filed, by **Charles Davis,** individually and on behalf of his minor children, Charles Davis, Jr., and Jerry Davis, seeking damages against Louis C. Philips, and his insurer, Royal-Globe Insurance Company (actually Globe Indemnity Com-

pany), wherein said petitioner alleged that he was married to Pauline Davis and that the two (2) children involved in the suit were born of said union; that since January 30, 1964, petitioner, his wife, and the said children, lived at 4811 Prytania Street, lower apartment, (New Orleans, Louisiana) owned by defendant Philips; that the children became ill on or about May 13, 1964, allegedly due to:

> ". . . defendant's negligence and failure to repair the ceiling that large flecks of paint and plaster falling from the ceiling to the floor resulting in these children of tender age being able to eat the same and suffering as a result acute lead poisoning."

Both defendants filed a PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION, with attached Memorandum of Authorities in support thereof. After hearing argument, the Trial Judge, without any written reasons therefor, overruled these exceptions and ordered defendants to answer. Defendants filed responsive pleadings, denying any and all liability which pleadings were filed on June 30, 1965.

On January 16, 1967, by *ex parte* application, Mrs. Pauline Green Davis filed application for appointment as Provisional Tutor of the children involved in the suit, and at the same time filed a "Motion to Substitute Party Plaintiff." During the course of the trial, when plaintiffs' evidence disclosed that there was never any marriage between Charles Davis and Pauline Green "Davis," defendants filed another Peremptory Exception and Memorandum in support thereof challenging the legal right, or interest, of original plaintiff, Charles Davis, as well as Mrs. Pauline Green "Davis" to institute this lawsuit, and, further, pleading prescription of one (1) year under Louisiana Civil Code Article 3536. These exceptions were overruled by the Trial Judge.

Trial was had, before a jury, and the jury verdict was rendered against both defendants, in solido, in favor of Mrs. Pauline Davis on behalf of her minor son, Charles Davis, Jr., in the amount of $115,000.00, and on behalf of Jerry Davis, in the sum of $2,500.00 and for all costs, but limiting Globe's liability to its policy limits of $50,000.00 for each claim.

Defendants timely filed a Motion for New Trial and Alternatively a Remittitur, with supporting Memorandum which the Judge denied. Judgment was entered on the jury verdict on January 30, 1968, and defendants filed Petition for Appeal, Suspensive and Devolutive.

Suspensive appeals were effected from the Trial Court judgment on behalf of both defendants, Philips and Globe, and on June 2, 1969, the Court of Appeal, Fourth Circuit, affirmed the Trial Court Judgment.

Application for rehearing was filed with the Court of Appeal, Fourth Circuit, by Philips and Globe, and was denied by the said Court on July 7, 1969.

A Petition for a Writ of Certiorari, or Review, was filed with the Louisiana Supreme Court on August 4, 1969, presenting the following "issues"; "questions of Law"; and "assignments of errors":

> **"ISSUES**
>
> Is a LANDLORD responsible in damages when a tenant's children "eat paint" from the rented premises, when the evidence is clear that the landlord did **not** use any "lead-base" paint, at any time, inside the said property?
>
> Is there any logical legal distinction to be made when the plaintiff alleges that the children "ate

paint" from **inside** the rented premises, to make the landlord responsible, but to free the landlord from liability if the allegation is that the child ate paint "from the outside" of the same property?

QUESTIONS OF LAW

1. Is "eating the premises" an extraordinary and unreasonable use of the premises?

2. Is the New York District Court decision, *Acosta v. Irdank Realty Corporation*, applicable in Louisiana, in the face of the **later** Louisiana decision in *Montgomery v. Cantelli*, wherein writs were refused by the Louisiana Supreme Court?

3. Was there an intervening or "superseding" negligence of the mother and "grandmother" of the minor plaintiffs sufficient to free Philips from any liability herein?

4. Should the absence of Mrs. Catherine LaFleur, at the trial, constitute any "inference" against defendants?

5. Was the **last** paint sample (the only one that contained lead) subject to contamination, so as to destroy the "chain of evidence" and leave plaintiff's case with no proof of causation traceable to Philips?

6. Should the trial court, and the Fourth Circuit Court of Appeal, have sustained the **second** peremptory exception of no right of action, and prescription, filed by defendants during the course of trial?

ASSIGNMENT OF ERRORS:

1. The Honorable Court of Appeal committed error in not holding that "eating the premises" is an unreasonable, abnormal, and extraordinary use of the premises, and sustaining the defendants' **first** PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION.

2. The Honorable Court of Appeal committed error in relying on the New York District Judge's decision in *Acosta v. Irdank Realty* in the face of the later Louisiana decision in *Montgomery v. Cantelli*, decided by the same Fourth Circuit Court of Appeal, wherein writs were denied by the Louisiana Supreme Court.

3. The Court of Appeal committed error in refusing to hold that there was intervening, or superseding, negligence on the part of the mother and "grandmother" of the plaintiffs herein, sufficient to free Philips from any liability herein.

4. The Court of Appeal committed error in entertaining an "inference" against defendant in view of the absence of Mrs. Catherine LaFleur at the trial.

5. The Court of Appeal committed error in refusing to find that the last paint sample (the only one that contained lead) was subject to contamination, and in refusing to hold that the procedure in procuring this evidence, used by claimant's "investigator" destroyed the legal "chain of evidence."

6. The Court of Appeal committed error in refusing to sustain the second peremptory exception of no cause of action and prescription filed by the defendants during the course of trial.

7. The Honorable Court of Appeal committed error in refusing to find that the Trial Judge prejudiced the trial jury in delivering plaintiffs' special charges to the jury Nos. 7, 8, and 12.

8. The Honorable Court of Appeal committed error in not holding that the judgment herein was contrary to law and/or excessive because the jury award was based on speculative and conjectural testimony."

The Supreme Court of Louisiana granted Defendants writs on November 6, 1969, and eventually, after full

briefs, and oral arguments, reversed the State Court of Appeal, rendering its decision, which is now under consideration.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

I.

"NOTHING NEW" PRESENTED!

Respondents suggest that **this Court** has already considered ALL of the alleged issues relied on by Petitioner Davis herein, as recently as **October 13, 1969,** and REFUSED to grant writs, in a Louisiana case! (See *MAYS, ET AL V. McKEITHEN, ET AL,* 396 U.S. 868, 90 S. Ct. 108, 24 L. Ed. 2d 121, which we quote as follows:

> "Docket No. 44, Misc.
>
> October 13, 1969 — Motion of the Louisiana Trial Lawyers Association for leave to file brief, as amicus curiae granted. Petition for Writ of Certiorari to the Supreme Court of Louisiana **denied**!"

The above-cited MAYS, et al lawsuit involved a State Court jury finding in favor of the plaintiffs, and the jury award of $150,000.00, which was reversed, on the facts, by the First Circuit Court of Appeals for the State of Louisiana. The plaintiffs applied to the Supreme Court of the State of Louisiana for writs directed to the Louisiana First Circuit Court of Appeals, which were denied.

Then plaintiffs filed "Petition for Writ of Certiorari" with the SUPREME COURT **OF THE UNITED STATES,** and the LEGAL ISSUE presented by the said plaintiffs in the MAYS, ET AL Petition for Writs is "on all fours" with the alleged Federal constitutional questions presented by Petitioner Davis in the present Writ application!

Under the section styled "QUESTIONS PRESENTED", the plaintiffs in MAYS, ET AL asked the United States Supreme Court the following:

> "1. Is the last clause of the Seventh Amendment proscribing re-examinaion of facts found by a jury obligatory on a state court, where the Legislature of that state has granted to its citizens by statute plenary right to trial by jury of all issues of fact involved in claims in the nature of suits at common law?
>
> 2. Is the proscription against re-examination of jury findings by any court such a fundamental part of due process as to fall under the protective aegis of the due process clause of the Fourteenth Amendment and thus obligatory on state courts, where citizens of such a state have been granted the statutory right of trial by jury of all issues of fact involved in claims in the nature of suits at common law?"

The plaintiff attorneys, in the MAYS, ET AL Petition for Writs, completely briefed all possible legal issues dealing with the subject matter now considered, including each and every issue raised by the plaintiffs in the case at bar (as well as others not here presented) and it is interesting to note that the United States Supreme Court even **granted** the Motion of the Louisiana Trial Lawyers Association to file a brief, as amicus curiae.

Subsequently, on October 13, 1969, the United States Supreme Court DENIED WRITS in *MAYS, ET AL vs. McKEITHEN, ET AL*, 396 U.S. 868, 90 S. Ct. 108, 24 L. Ed. 2d 121.

Under the circumstances applicable here, Respondents suggest that this Petition does not qualify for the granting of a Writ under Rule 19(1)(a) of this Honorable Court.

II.

SEVENTH AMENDMENT OF U. S. CONSTITUTION NOT APPLICABLE IN "STATE COURTS", ON A "STATE-CREATED" CAUSE OF ACTION!

At the core of plaintiffs' claims is the assertion that the Seventh Amendment's requirement of a jury trial by the common law in civil cases is a right, privilege and immunity of the citizens of the United States and as such may not be denied to Louisiana citizens due to the privileges and immunities clause of the Fourteenth Amendment. In other words, plaintiffs allege (or assume) that the Seventh Amendment **applies to the States.** Not only is this assumption unwarranted, in fact, but the directly opposite view has been consistently and repeatedly held to be the law by the Supreme Court of the United States. (It should be noted at the outset that we are here dealing with a trial in a State Court, **on a State-created cause of action;** for trials in a State Court on a federally-created cause of action, e.g. Federal Employers Liability Act or the Jones Act, a different situation prevails).

In *Barron v. Baltimore*, 7 Pet. 242, 8 L. Ed. 672, (1833), Chief Justice John Marshall established the position that the first ten amendments to the U. S. Constitution were limitations on the Federal government, and **not upon the States.** "The amendments contain no expression indicating an intention to apply them to State Governments. The Court cannot so apply them."

The passage of the Fourteenth Amendment did not overrule Justice Marshall's holding, but rather modified it to the extent that when rights secured by the U. S. Constitution are of such fundamental importance to due proc-

ess of law, a State may not deprive a person of those rights, *Twining v. N. J.*, 211 U.S. 78, 96, 29 S. Ct. 14, 18. The Supreme Court has not held that trial, by jury, **in a State Court** is a fundamental element of due process of law.

The first case to directly consider the applicability of the Seventh Amendment to the States was *Edwards v. Elliott*, 88 U.S. 487, 21 Wall 532 (1874), which dismissed the contention with the passing remark, "That it (the Seventh Amendment) does not apply to trials in the State Courts."

This question was more squarely put to the Supreme Court two years later as to whether the Fourteenth Amendment made trial by jury in civil cases obligatory in State Courts. In the case of *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1876), petitioner alleged that a Louisiana statute giving a judge the duty to direct a verdict when a jury was unable to agree on a decision violated the Seventh and Fourteenth Amendments and was unconstitutional. The court held the Statute constitutional and valid!

> "So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the [Louisiana] Act of 1871 to the contrary.
>
> "By Article VII of the Amendments it is provided, that 'In suits at common law . . . the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott*, 21 Wall. 557, 22 L. Ed. 492 (Sic). The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury is not a privilege or immunity of national citizenship, which the States are forbidden by the

> Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hobken L. & I. Co.*, 18 How. 280, 15 L. Ed. 376. . . . Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

The principles enunciated in *Walker v. Sauvinet* were frequently quoted by the Supreme Court as well as expanded in the four decades following that decision. Mr. Justice Holmes, speaking for a unanimous Court in *Chicago, R. I. & P. R. Co. v. Cole*, 251 U.S. 54, 40 S. Ct. 68 (1919), summarized the State of the law in this area as follows:

> "There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678; modify its constitution, *Maxwell v. Dow*, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; the requirements of a verdict, *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U.S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L.R.A. 1917A, 86 Ann Cas. 1916E, 505; or the procedure before it, *Twining v. New Jersey*, 211 U.S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; *Frank v. Mangum*, 237 U.S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commision not known to the common law, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it

> may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in *Spark v. United States*, 156 U.S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed."

The "leading case" of *Walker v. Sauvinet, supra*, has been cited, with approval, by our United States Supreme Court, down through the years and reference is made to *Palko v. Connecticut*, 302 U.S. 319, 58 Sup. Ct. 149, 151 (1937); *Malinski v. New York*, 324 U.S. 401, 65 Sup. Ct. 781, at page 788 (1944); *Stein v. New York*, 346 U.S. 156, 73 Sup. Ct. 1077 at page 1090 (1953); *Hauge v. C.I.O.*, 59 Sup. Ct. 954 (1939) at page 966.

The lower federal courts have held that the issue is so foreclosed as to fail to present a substantial federal question. In point is *N. J. Chiropractic Association v. State Board*, 79 Fed. Sup. 327 (D.C. N.J., 1948):

> "The rule in *Palko v. Connecticut*, 302 U.S. 319, at page 324, 58 S. Ct. 149, 151, 28 L. Ed. 288, governs as it is therein stated in the following language:
>
> 'The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed $20.00. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished together. *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678; *Maxwell v. Dow*, 176 U.S. 581, 20 S. Ct. 448,

494, 44 L. Ed. 597; *New York Central R. Co. v. White*, 243 U.S. 188, 208, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D.I. Ann. Cas. 1917D, 629; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 591, 67 L. Ed. 961.' Again, the plaintiffs have failed to present a substantial federal question for consideration of the court because prior decisions of the United States Supreme Court have foreclosed this subject."

Also directly in point is *Olsen v. Trust Co. of Chicago*, (C.A. 7th, 1957) 245 F. 2d 522, certiorari denied, 355 U.S. 896, 78 S. Ct. 270:

"It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. *Bute v. People of State of Illinois*, 333 U.S. 640, 657 (footnote), 68 S. Ct. 763, 92 L. Ed. 986. Trial by jury in civil actions in State Courts may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678; *Maxwell v. Dow*, 176 U.S. 581, 20 S. Ct. 494, 44 L. Ed. 597; *New York Central Railroad Company v. White*, 243 U.S. 188, 208, 37 S. Ct. 247, 61 L. Ed. 667; *Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 67 L. Ed. 961.

"A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co.*, 284 U.S. 151, 158, 52 S. Ct. 69, 71, 76 L. Ed. 214. . . .

"Ordinarily we are reluctant to dismiss an appeal upon motion. Usually we take the motion to dismiss with the cause and consider same when the case is submitted on the merits, but in the case at

> bar, it would be an imposition upon the defendants to inflict the expenses incident to an appeal when it is so clear that nothing that could be presented upon the hearings of the cause could change the obvious fact that this is a case where no federal question is involved, and the Federal Courts should not interfere with the processes and procedures of the State Court.
>
> "The appeal is dismissed at plaintiff's costs."

In another recent Federal decision, *Iacaponi v. New Amsterdam*, 258 Fed. Sup. 880 (W.D. Pa. 1966); affirmed 3rd Cir. 379 Fed. 2d 311; cert. denied 389 U.S. 1054, 88 Sup. Ct. 802, 19 L. Ed. 2d 849, held at page 844:

> "A litigant in a State Court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. A State may establish its own procedures and practices with regard to the conduct of civil litigation including the right of trial by jury. *Hardware Dealers Mut. Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931). We find no denial of due process in this procedure and we further find that the procedure under the Workmen's Compensation Act of Pennsylvania is the exclusive remedy for the cause of action pleaded herein."

We conclude, therefore, that the state of the law is clear:

1. Trial by jury is not a privilege or immunity of citizens of the United States.
2. Trial by jury, per se, is not a requirement of due process of law.
3. The Seventh Amendment does not apply to the States.

In view of the unbroken and consistent line of deci-

sions supporting the above propositions, one may only conclude that the question raised by Petitioner Davis is foreclosed, and the law is settled!

III.

NO "SUBSTANTIAL FEDERAL QUESTION INVOLVED!"

There is NO CLAIM by Petitioner Davis herein that there is any discrimination as between Louisiana litigants, similarly situated, involved in a lawsuit in the State Courts of Louisiana! The only complaint is that there is a difference in appellate review of jury decisions as between the Federal and State Court judicial systems!

Here Petitioner Davis **chose the forum,** and elected to file suit in the State Courts of Louisiana, and should not now be heard to complain that she might have obtained a favorable result under the federal appellate procedures.

Further, even if plaintiffs had the right to a jury trial under the Seventh Amendment in which "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," their petition still fails to assert a substantial federal question because **a judge, at common law,** could set aside a jury verdict for insufficiency of the evidence. *Aetna Casualty & Surety Co. v. Yeatts*, C.C.A. 4th, 122 F. 2d 350 (1943), and *Sunray Oil Corp. v. Allbritton*, C.A. 5th, 197 F. 2d 475, 477-484. The U. S. Supreme Court has held in *Montgomery Ward & Co. v. Duncan*, 61 S. Ct. 189 at 194, 311 U.S. 243 (1940) that one of the reasons for Rule 59(a) is that when the verdict is against the weight of the evidence it should not stand. Even the most quoted definition of a jury trial recognizes this power of the judge:

> " 'Trial by jury' in the primary and usual sense of the term at the common law and in the American Constitutions . . . is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." *Capitol Traction Co. v. Hof*, 19 S. Ct. 580, 174 U.S. 1 (1899).

The common law, and present federal law and practice, sanction the propriety of the Supreme Court of Louisiana setting aside the jury verdict for insufficiency of the evidence, or for "manifest error." It is patently clear that even if Petitioner Davis' contention that the Seventh Amendment applies to the States is accepted, Petitioner may not be granted relief as the Seventh Amendment has not been violated. Therefore, the purported federal question asserted herein is insubstantial and jurisdiction should be denied!

IV.

SUPREME COURT OF LOUISIANA DID FIND "ERRORS OF LAW" SUFFICIENT TO JUSTIFY ITS DECISION!

In the Petition for Writs filed by Defendant in the State Supreme Court, Respondents assigned as error the trial court's jury instructions dealing with Louisiana Civil Code Articles 2322 and 670, contending that said statutes were NOT applicable to the facts at bar.

The State Supreme Court interpreted the crucial **legal phrase** "ruin" in said Article 2322, tracing same back to its source in the old French law ("ruine") in the Louisiana Code of 1808, and held that this statute, as well as Article

670, should NOT have been applied to this case!

Such constitutes a finding of "error of law" on the part of the lower State Courts, alone sufficient to warrant the decision of the Supreme Court of Louisiana.

This analysis **removes the foundation** of Petitioner's arguments that the Louisiana Supreme Court decision is based **only** "on questions of fact." Even taken alone, this conclusion is sufficient to justify denial of this writ application!

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana should be DENIED!

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, PAUL V. CASSISA, a member of the Bar of the United States Supreme Court, certify that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on Counsel for Petitioner herein by depositing same in the United States mail, first class, postage prepaid, on this ..... day of May, 1971.

PAUL V. CASSISA